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Chair: Mr. Kohona ..... (Sri Lanka)
later: Mr. Salem (Vice-Chair) ..... (Egypt)

Contents

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*)

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The meeting was called to order at 3 p.m.

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*) (A/68/113)

1. **Mr. Silberschmidt** (Switzerland), speaking also on behalf of Liechtenstein, said that universal jurisdiction helped to ensure that those guilty of the most serious crimes in a given jurisdiction were prosecuted if that so jurisdiction was unable to do so. For some criminal offences, universal jurisdiction was required under applicable international treaties or could be invoked on the basis of customary law. However, Member States' positions on the issue differed widely: some had incorporated the principle into their national law, while others had not; some had established it in respect of a wide variety of offences, while others concentrated on genocide, war crimes and crimes against humanity; and some saw a risk of abuse, while others considered the principle a crucial pillar in the effort to combat impunity for the worst crimes.

2. The diversity of views and practices among Member States had hindered progress in the Committee's discussions in recent years; the establishment of a Working Group on the topic was therefore a positive development. However, given the juridical and technical nature of the topic, the possibility of involving the International Law Commission in the debate should be given serious consideration. The Commission could be mandated to consider the status of universal jurisdiction under international law as a whole, or to help provide answers to more specific legal questions through an analytical study focusing on the exercise of universal jurisdiction by national courts in criminal proceedings, similar to its 2006 study on the fragmentation of international law. To that end, it could draw on progress made on other topics on its agenda, such as the obligation to extradite or prosecute (*aut dedere aut judicare*).

3. **Mr. Belaid** (Algeria) said that universal jurisdiction was an important instrument in combating impunity for serious crimes, provided that it was applied in good faith and in accordance with principles of international law, such as State sovereignty, territorial jurisdiction, the primacy of action by States in criminal prosecutions, the protective principle and, most of all, the immunity of incumbent Heads of State and Government. Universal jurisdiction should be a complementary mechanism and a measure of last resort.

4. His Government was concerned about the selective, politically motivated and arbitrary application of universal jurisdiction without due regard for international justice and equality. The International Criminal Court, throughout its 11 years of existence, had focused exclusively on African States while ignoring unacceptable situations in other parts of the world. Accordingly, at its extraordinary session held in Addis Ababa on 12 October 2013, the Assembly of the African Union had decided that, to safeguard the constitutional order, stability and integrity of its member States, no charges should be commenced or continued before any international court or tribunal against any serving African Union Head of State or Government or anyone acting or entitled to act in such capacity during his or her term of office. In that light, his delegation supported the Committee's continued work on the scope and application of the principle of universal jurisdiction on the basis of respect for the sovereign equality and political independence of States.

5. **Ms. Tatarinovich** (Belarus) said that, before aspects of the principle of universal jurisdiction could be reflected in national legislation, the specific crimes to which it applied — which should include crimes against peace, war crimes, crimes against humanity and piracy — must be established in international law. In practice, limited universal jurisdiction already existed over crimes that were the subject of international conventions, provided that a link existed between the alleged perpetrator and the forum State. Her Government favoured a treaty-based, rule-of-law approach to universal jurisdiction, which could be considered legitimate only if it was consistent with generally accepted norms of international law and the Charter of the United Nations; otherwise, it amounted merely to the extraterritorial application of the laws of individual States.

6. It was important to rid the concept of universal jurisdiction of its inherent contradictions and of shortcomings resulting from the lack of functioning international cooperation mechanisms, the absence of a clear list of crimes to which it applied, the practice of in absentia convictions and issues concerning its applicability to individuals who enjoyed privileges and immunities under international law. The perpetrators of

international crimes should be prosecuted and punished in accordance with States' international obligations and domestic laws. Universal jurisdiction was optional and should be applied only where national jurisdiction lacked effect, and in good faith. A balance needed to be struck between the progressive development of the principle of universal jurisdiction and respect for the principles of equity, sovereign equality of States and non-interference in their internal affairs.

7. The Committee and the Working Group on the scope and application of the principle of universal jurisdiction should seek to establish consensus on a list of crimes to which universal jurisdiction could be applied. States' views expressed in that regard might also be useful to the International Law Commission in the context of its examination of the obligation to extradite or prosecute (*aut dedere aut judicare*). Her delegation supported the proposal that the Committee and the Commission should cooperate in that regard.

8. **Mr. Gebremeskel Zewdu** (Ethiopia) said that his Government was committed to the application of the principle of universal jurisdiction, which was enshrined in the Criminal Code of Ethiopia as a complementary instrument in the effort to combat impunity. Universal jurisdiction should be exercised in accordance with universally recognized rules of international law. The primary responsibility for prosecution rested with the Member State where the crime had been committed; universal jurisdiction should be invoked only for serious crimes that affected the whole of humanity and were condemned by the international community.

9. The absence of a generally accepted definition of universal jurisdiction and a lack of consensus on the offences that were subject to it had made it difficult to strike an appropriate balance between bringing perpetrators to justice and limiting the scope and application of the principle. Differing approaches had resulted in subjectivity that was undermining the common resolve to combat impunity. The various decisions of the Assembly of the African Union reflected its concern about prosecutions instituted and arrest warrants issued by certain foreign courts against sitting African Heads of State and Government and other high-ranking officials, in violation of the immunity granted to them under international law. State sovereignty and the primacy of action by States in criminal prosecutions and the immunities to which certain State officials were entitled under international law must be respected when applying universal jurisdiction.

10. The General Assembly should therefore adopt a resolution limiting the scope and application of the principle and urging Member States to refrain from its misapplication. The Committee should also explore the possibility of developing a consistent standard in that regard that would be acceptable to all Member States.

11. **Mr. Joyini** (South Africa) said that true universal jurisdiction applied only to crimes under customary international law. However, in recent years a number of multilateral treaties had conferred quasi-universal jurisdictional powers on their States parties by requiring them to prosecute or extradite persons accused of certain international crimes who happened to be present in their territory. Such jurisdiction was known as conditional universal jurisdiction, in that the exercise thereof was conditional upon the presence of the accused person in the forum State, which might otherwise have no other jurisdictional link to the crime. Thus it was largely left to national courts to enforce international criminal law by prosecuting enemies of all humankind in whose punishment all States had an equal interest.

12. The laws of the country in question determined whether a criminal prosecution or a civil case for damages could be brought on the basis of universal jurisdiction. Most States, including South Africa, would not try a person for an international crime unless the conduct had been criminalized under domestic law. His Government had incorporated a wide range of international crimes under treaties such as the Rome Statute of the International Criminal Court and the Geneva Conventions of 1949 into the country's domestic law, thus providing for a form of universal jurisdiction. It had also adopted legislation providing for extraterritorial jurisdiction over mercenary activities and foreign military assistance, where there was a jurisdictional link to South Africa. In a recent court case, it had been found that the South African authorities, in accordance with the law on the implementation of the Rome Statute and the Constitution, were under an obligation to investigate and, where appropriate, prosecute nationals of another country accused of torture of their fellow citizens in their own country on the basis of their presence in South African territory. However, that finding was currently under appeal in the Supreme Court of Appeal.

13. Despite the general consensus that universal jurisdiction was an important principle in combating impunity, a number of issues remained unresolved: the definition of the principle and the need to distinguish it from related concepts, such as the jurisdiction exercised by international criminal tribunals established by treaties; the relationship between the obligation to extradite or prosecute and the jurisdiction of national courts, in particular the question of which system had primacy; the temporal immunity of Heads of State and the assurance of due process and fairness in national proceedings based on universal jurisdiction; the question of which crimes were subject to universal jurisdiction, beyond those on which there was general agreement, which included piracy, slavery, war crimes, crimes against humanity, genocide and, by convention, torture and certain international terrorist crimes; the possible politicization or selective and arbitrary application of the principle; and the possible referral of the topic to the International Law Commission. While there was a growing conviction worldwide that impunity should no longer be tolerated and that human rights must be protected, a balance must be struck between those imperatives and the need to respect State sovereignty.

14. **Ms. Bagley** (United States of America) said that, despite the importance of the principle of universal jurisdiction and its long history as a part of international law relating to piracy, basic questions concerning its exercise in respect of universal crimes remained. The practical application of universal jurisdiction, including whether and how often it was invoked; the question of whether alternative bases for jurisdiction could be relied upon simultaneously; and the available safeguards to prevent inappropriate prosecution merited further examination. Her delegation would welcome information on the practice of other States and looked forward to considering the issues in as practical a manner as possible.

15. **Ms. Enersen** (Norway) said that the international community was united in its opposition to impunity for the most serious crimes of international concern. Universal jurisdiction had gained ground as a fundamental principle of criminal law at both the national and the international levels. The primary responsibility for the investigation and prosecution of crimes lay with the territorial State or the State or States with personal jurisdiction; in most cases, the territorial State was best placed to gather evidence, secure witnesses and ensure that those affected by the crime received accurate information on the case. The application of universal jurisdiction should, in principle, be considered only when States were unable or unwilling to apply other types of criminal jurisdiction.

16. Her delegation welcomed the Working Group's development of a working concept of universal jurisdiction, which would help to bring clarity to the Committee's deliberations. However, any attempt to develop an exhaustive list of crimes to which universal jurisdiction applied was likely to prove fruitless and would involve an unprecedented attempt to harmonize Member States' interpretation of their treaty obligations, which was not the task of the General Assembly.

17. Universal jurisdiction should be applied only in the interests of justice; appropriate checks and balances and ways of limiting its misuse for political purposes should therefore be explored. A study of best practices in independent prosecutorial offices would be useful for that purpose. A priority issue was how to ensure prosecutors' independence from political and other external influences. A number of United Nations documents, such as the Guidelines on the Role of Prosecutors, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, could be useful in that regard. Other relevant questions were whether and how prosecutorial discretion applied to cases that were subject to universal jurisdiction in various States; where and to whom competence to decide on the matter was bestowed within States and whether that decision was collegial or not; and to what extent a prosecutorial decision on universal jurisdiction could be appealed.

18. The Committee should not engage in a discussion on immunity for State officials under the current agenda item, as that topic was not uniquely relevant to universal jurisdiction; immunity from criminal prosecution could, along with other factors relating to criminal liability, be relevant in cases involving any form of jurisdiction. Furthermore, the question was under consideration by the International Law Commission, and deliberations in the Committee were unlikely to be fruitful.

19. **Mr. Al-Ghanem** (Qatar) said that universal jurisdiction was an important mechanism for ensuring

the rule of law and equitable justice and combating impunity for serious violations of international law, international humanitarian law and human rights. Given the wide range of views on the topic among States, the Working Group should define those points on which there was consensus and those that required further study and consultation.

20. Universal jurisdiction and international criminal jurisdiction shared the same objective of putting an end to impunity, as affirmed by relevant General Assembly resolutions. Nonetheless, it was important to define the principle of universal jurisdiction and to clarify which crimes, beyond piracy, crimes against humanity, war crimes, genocide and gross violations of human rights, fell within its scope. His delegation would rely on the Working Group's conclusions and recommendations in that regard.

21. While there was a need to bring the perpetrators of international crimes to justice, universal jurisdiction should be exercised in accordance with internationally agreed mechanisms, in good faith and in compliance with the principles of international law. In order to define the scope of universal jurisdiction, it was important to strike a balance between the progressive development of the concept and the need to uphold the principles enshrined in the Charter of the United Nations, including the sovereign equality of States.

22. Serious violations of international law were occurring in numerous regions, including the Middle East; millions of people were being displaced and peaceful citizens were being subjected to aerial bombardment and terrorized simply for asserting their legitimate rights to liberty, dignity and self-determination. The perpetrators were exploiting lacunae in the international regime and the weakness of international political will in order to continue committing their crimes with impunity. The scope of universal jurisdiction must cover such crimes and the perpetrators must be brought to justice, in order to send a clear message that no one was above the law.

23. **Ms. Rodríguez Pineda** (Guatemala) said that the exercise of universal jurisdiction was acceptable in respect of certain serious international crimes that shocked humanity as a whole and where conventional jurisdiction could not be exercised. In such cases, all States had a responsibility to bring the perpetrators to justice. The International Criminal Court, though responsible for administering international justice, did not exercise universal jurisdiction, but universal jurisdiction remained particularly pertinent in cases where the Court's jurisdiction could not be invoked. In that connection, her Government reaffirmed its commitment to supporting the Court's universality and integrity.

24. Universal jurisdiction was indirectly linked to, but also differed in certain respects from, the jurisdiction exercised by international tribunals, certain forms of extraterritorial jurisdiction, the obligation to extradite or prosecute, and the immunity of State officials from foreign criminal jurisdiction. Given the complexity of the issue and the inadequacy of the information gathered so far on States' views and practices, her delegation agreed with the proposal that the International Law Commission should be requested to prepare a study on the status of the principle in international law, which would provide a solid legal basis for consideration of its scope and application. The informal papers on the topic prepared by the Office of Legal Affairs in 2010 should also form part of the discussion.

25. The diversity of legal systems around the world created a risk of subjective interpretation of the principle, and many countries lacked the capacity to try extraterritorial criminal cases; the Commission's involvement might be helpful in that context. It would also prevent duplication of work, as the Commission was already considering important issues linked to universal jurisdiction in the context of its deliberations on the obligation to extradite or prosecute and the immunity of State officials. Furthermore, the Commission would be able to ensure that political considerations did not overshadow the legal issues; the Committee's deliberations, on the other hand, might prove to be both lengthy and fruitless.

26. **Mr. Estrémé** (Argentina) said that the primary responsibility for the investigation and prosecution of international crimes lay with the States in which the crimes were committed or with other States that had a link with the crime, such as the State of nationality of the perpetrator or the victims. Where those States were unable or unwilling to prosecute, other States could do so on the basis of universal jurisdiction, which was an additional tool to be used in exceptional circumstances in order to prevent impunity. Universal jurisdiction was thus an essential component of the international criminal justice system. Its unlimited use could, however, lead to conflicts of jurisdiction between

States, procedural abuse and politically motivated prosecutions. Clear rules for its exercise were needed, particularly in the light of certain erroneous interpretations of the principle.

27. The Working Group on the topic should take a step-by-step approach, focusing first on the concept of universal jurisdiction and then on its status in international law, including the legislative and judicial practices of States, and the conditions under which it might be exercised. Discussion of the concept should seek to distinguish it from the principles of *jus cogens*, *obligatio erga omnes* and, especially, *aut dedere aut judicare*. The possibility of referring the matter to the International Law Commission should not be ruled out; the Commission could be asked to produce a study in parallel with the Committee's consideration of the topic.

28. The examination of international treaties, internal legislation and judicial practice must take into account the difference between the obligation *aut dedere aut judicare* and universal jurisdiction. The latter was included explicitly or implicitly in many multilateral treaties. As the International Law Commission had decided to focus on the former concept, the Working Group should consider the relationship between the two but concentrate primarily on the latter.

29. **Ms. Norsharin** (Malaysia) said that the Working Group should continue its thorough discussion of the scope and application of universal jurisdiction, as it was important to agree on a definition of the concept and to distinguish it from related concepts, such as international criminal jurisdiction and the obligation to extradite or prosecute. Universal jurisdiction was an attractive concept in that it provided all States with an opportunity to exercise jurisdiction over serious crimes of international concern and served as a means of deterring and punishing such crimes. However, prosecution in national courts on the basis of territoriality, nationality, the protective principle or passive personality should remain the primary avenue for combating impunity. Recourse to international criminal tribunals, permanent or ad hoc, was another possibility.

30. A clear definition of universal jurisdiction must be agreed upon before further progress could be made. Her delegation welcomed the comments submitted by Member States in that regard; however, there had not yet been a constructive discussion on the ultimate goal of the principle. A uniform view was imperative in order to avoid different standards of application in different countries. While her Government did not favour international regulation, it considered that States should exercise caution when applying universal jurisdiction or enacting related legislation.

31. The exercise of universal jurisdiction must be based on enabling domestic law. Malaysia already had a domestic legal framework in place: the Penal Code provided for extraterritorial jurisdiction in respect of terrorist offences, while another law empowered the courts to take jurisdiction over such offences. Further laws established extraterritorial jurisdiction in respect of offences such as trafficking in persons, computer crimes and money-laundering, and any offence that threatened Malaysia's security. Lastly, her delegation believed that the International Law Commission should conduct an in-depth study of the topic of universal jurisdiction.

32. **Mr. Choi** Yong Hoon (Republic of Korea) said that, while it was generally agreed that war crimes and piracy were subject to universal jurisdiction, there was a lack of consensus on other crimes, and on the definition of the principle more generally. Its application was legally complex and raised many practical questions, including who would exercise it and when and how it would be exercised. Universal jurisdiction should not be misused for political purposes and should be exercised in a manner that did not conflict with other peremptory norms of international law. In order to move forward on the topic, his delegation suggested that the International Law Commission should be asked to make a contribution, particularly in connection with its work on the principle *aut dedere aut judicare*.

33. **Mr. Silva** (Brazil) said that the aim of universal jurisdiction was to deny impunity to individuals allegedly responsible for extremely serious crimes defined by international law which, by their gravity, shocked the conscience of all humanity and violated peremptory norms of international law. As a basis for jurisdiction, it was of an exceptional nature compared to the more consolidated principles of territoriality and active and passive personality. Although the exercise of jurisdiction was primarily the responsibility of the territorial State in accordance with the principle of the sovereign equality of States, combating impunity for the most serious crimes was an obligation contained in numerous international treaties. Universal jurisdiction

should be exercised only in accordance with international law and principles; it should be subsidiary to domestic law and limited to specific crimes; and it must not be exercised arbitrarily or to fulfil interests other than those of justice.

34. His delegation supported an incremental approach to discussion of the issue; the Working Group's first step should be to seek an acceptable definition, which, together with a shared understanding of the scope and application of universal jurisdiction, was necessary in order to avoid improper or selective application. The Working Group should then consider the kinds of crimes to which such jurisdiction would apply and whether it was subsidiary to territoriality and personality as bases for jurisdiction. At the appropriate time, it should also consider whether the formal consent of the State where the crime had taken place and the presence of the alleged perpetrator in the territory of the State wishing to exercise jurisdiction were required. One of the most contentious issues was how to reconcile universal jurisdiction with the jurisdictional immunities of State officials. His delegation hoped that Member States could show flexibility in agreeing on some core elements in due course. At the current stage of discussion, it would be premature to consider the adoption of uniform international standards on the matter.

35. Brazil's legislation recognized the principles of territoriality and active and passive personality as bases for criminal jurisdiction. Its courts could exercise universal jurisdiction over the crime of genocide and other crimes, such as torture, which Brazil had a treaty obligation to suppress. Such jurisdiction must be envisaged in a State's domestic law; it could not be exercised on the basis of customary international law alone without violating the principle of legality. Although there was a difference between universal jurisdiction and the exercise of criminal jurisdiction by international tribunals, the two institutions shared a common objective: to deny impunity to those accused of serious international crimes.

36. **Mr. Gonzalez** (Chile) said that jurisdiction was an essential element of the rule of law and was inherent in State sovereignty. A proliferation of laws in recent years had led to the exercise of jurisdiction in an inconsistent manner and without regard for its traditional underpinnings: territoriality and the nationality of the perpetrator and, in some cases, that of the victim. Confusion and legal uncertainty had ensued; the international community should therefore clarify the question of jurisdiction within the framework of international law and establish a means of regulating universal jurisdiction by defining its conceptual framework and establishing its scope and application and possible exceptions thereto.

37. In his delegation's view, universal jurisdiction should apply only in exceptional circumstances and in respect of serious crimes under international law. The Working Group should not, therefore, include civil law matters in its deliberations. His Government recognized universal jurisdiction in cases of piracy pursuant to the United Nations Convention on the Law of the Sea, and war crimes pursuant to the 1949 Geneva Conventions and Additional Protocol I of 1977. Universal jurisdiction could also be exercised on the basis of international law, especially treaty law, in order to prevent impunity for crimes against humanity, war crimes and genocide.

38. The foremost principle governing jurisdiction was territoriality; the courts of the State in which the crime had been committed had primary jurisdiction to investigate and punish the perpetrators. States should exercise universal jurisdiction only when the territorial State was unwilling or unable to investigate and prosecute the crime. However, States' competence to exercise universal jurisdiction should not derive solely from their domestic law, but also from broadly accepted international treaties.

39. The jurisdictional immunities recognized by international law should be interpreted and applied in a manner consistent with the need to combat impunity for grave international crimes. The international community should establish a set of rules in order to resolve doubts concerning the proper application of the principle of universal jurisdiction and to avoid the possibility of abuse, either through traditional channels for recourse to the courts or by other methods. The Working Group should continue its efforts to define the principle and its scope and application; in that context, he drew attention to the non-paper submitted by his delegation at the sixty-sixth session (A/C.6/66/WG.3/DP.1). If the Working Group was unable to make substantial headway on the issue in the short term, his delegation would be open to referring it to the International Law Commission for study.

40. **Mr. Puri** (India) said that universal jurisdiction, unlike traditional bases for jurisdiction, such as

territoriality, nationality or the protective principle, assumed that each State had an interest in exercising jurisdiction over offences that all nations had condemned on the grounds that they affected the interests of all States, even where they were unrelated to the State or States assuming jurisdiction. While piracy on the high seas was the only crime over which claims of universal jurisdiction were undisputed under the United Nations Convention on the Law of the Sea and under general international law, various treaties provided for such jurisdiction in respect of certain other crimes, such as genocide, war crimes, crimes against humanity and torture.

41. The question was whether the jurisdiction provided for under those treaties could be converted into a commonly exercisable jurisdiction, irrespective of whether the other State or States concerned were parties to them. The basis for extending and exercising such jurisdiction was unclear and questions remained regarding the relationship between universal jurisdiction and laws on immunity, pardon and amnesty and regarding its harmonization with domestic law. Furthermore, the principle of universal jurisdiction must not be confused with or be allowed to short-circuit the widely recognized obligation to extradite or prosecute.

42. **Ms. Govinnage** (Sri Lanka) said that universal jurisdiction had complex legal, political and diplomatic implications that had yet to be clarified. As the law in that area evolved, it was important to hear all views on the matter. First used to deal with piracy, the principle had expanded to cover other areas. In accordance with customary international law, local remedies must be exhausted prior to the application of universal jurisdiction. If a country's judicial mechanisms were already dealing with a case, universal jurisdiction should not be exercised in another jurisdiction. It was disturbing that, in certain cases, the judicial officers of countries carrying out investigations had proceeded on a unilateral basis and had ignored the decisions of national courts. Abuse of the principle would ultimately weaken it; in addition, its application risked infringing the principle of the sovereign equality of States enshrined in the Charter of the United Nations.

43. Her Government was concerned about the use of universal jurisdiction to target high-ranking officials and diplomatic agents, which constituted a disturbing attempt to test the scope of diplomatic privileges and immunities. It welcomed the fact that concerned States had begun to recognize the need to prevent such abuses and had introduced constraints such as requiring the approval of senior State authorities before claims could be instituted. The practical application of universal jurisdiction should be guided by international consensus. The Committee and the Working Group on the topic should seek to differentiate between the principle of universal jurisdiction and the treaty-based obligation to extradite or prosecute.

44. **Mr. Seoane** (Peru) said that it could be deduced from the information provided by States over the past four years that all States agreed that universal jurisdiction was a valid tool for combating impunity; that it was a supplementary institution of last resort in the absence of other bases for jurisdiction, such as territoriality and active or passive personality; and that the accused must be present in the territory of the forum State. There were differences of opinion, however, on the crimes to which universal jurisdiction applied and the applicable sources of international law; the question of whether a State could exercise such jurisdiction where not envisaged in its domestic law; the relationship between universal jurisdiction and the regime of immunities for State officials; and the cooperation and assistance mechanisms available to facilitate its exercise, particularly in relation to extradition requests.

45. The Committee was the appropriate forum in which to consider the scope and application of universal jurisdiction. However, it should reflect on whether discussions should continue in the Working Group or whether alternative ways of pursuing the debate would be more appropriate. Moreover, given the prevailing differences of opinion, the input of the International Law Commission was required, particularly as it was already examining other topics closely related to the scope and application of universal jurisdiction.

46. *Mr. Salem (Egypt), Vice-Chair, took the Chair.*

47. **Ms. Lee** (Singapore) said that it was her delegation's understanding that the current discussion of the principle of universal jurisdiction related only to the exercise of criminal jurisdiction. Moreover, the primary bases for the exercise of criminal jurisdiction by States were territoriality and nationality. The application of universal jurisdiction should be considered only when the States concerned were unable or unwilling to take action; the principle was

intended to complement rather than supplant States' jurisdiction, not least because of the practical challenges of conducting a prosecution in a situation where evidence might be difficult to obtain and the attendance of witnesses difficult to secure.

48. Universal jurisdiction should be applied only in respect of particularly heinous crimes that affected the international community as a whole and where there was general agreement that its application was appropriate. Further, it should be applied only in situations where failure to do so would allow the alleged perpetrator to continue to act with impunity, bearing in mind that it was only one of several tools available for combating impunity. Lastly, universal jurisdiction should not be exercised to the detriment of other principles of international law, such as the immunity of State officials from foreign criminal jurisdiction, State sovereignty and territorial integrity.

49. **Ms. Mäkelä** (Finland) said that the principle of universal jurisdiction was an important tool in combating impunity. When a case could not be tried in the State where the crime had been committed, or in a State with an active or passive personality link, or on other grounds of jurisdiction recognized in international law, universal jurisdiction enabled the authorities of a different State to investigate and prosecute the alleged perpetrators. There were, however, significant advantages to be gained from trying a case in the jurisdiction where the crime had taken place, including the possibility for victims to participate and for victims and affected communities to be aware of the efforts being made to bring alleged perpetrators to justice.

50. It was generally agreed that customary international law allowed for universal jurisdiction to be applied in respect of certain international crimes, although views differed as to its scope. In addition, while it was distinct from the obligation to extradite or prosecute, universal jurisdiction was the underlying notion in conventions that established that obligation. Although the informal paper presented by the Working Group at the sixty-sixth session of the General Assembly (A/C.6/66/WG.3/.1) would be of assistance in determining which crimes were subject to universal jurisdiction, the Working Group would need to be able to draw on more in-depth analyses before reaching any conclusions in that regard.

51. Given the complexity of the issues relating to both the scope of the principle of universal jurisdiction and its application, her delegation noted with great interest the proposal that the topic should be referred to the International Law Commission. Impunity was no longer an option, and there should be no attempt to limit the scope or application of the principle of universal jurisdiction in such a way as to suggest otherwise.

52. **Ms. Klečková** (Czech Republic) said that her delegation remained of the view that the question of the scope and application of universal jurisdiction was of a purely legal nature and should be referred to the International Law Commission for study. The Committee operated as a political body and was constantly under time pressure, whereas the Commission was an expert body that could allocate adequate time to the issue. The informal paper submitted by the Working Group, which contained essential elements of a definition of universal jurisdiction, could serve as a frame of reference for the Commission's work. The Commission could also build on its previous work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), which would probably be concluded without a substantive outcome.

53. The principle of universal criminal jurisdiction was recognized in Czech criminal law; universal civil jurisdiction was a valid but separate legal principle that should not be included in the current discussion. The jurisdiction of international criminal tribunals was also a separate issue, since such tribunals operated in accordance with distinct jurisdictional principles provided for in their respective statutes. From that perspective, universal jurisdiction was a matter for domestic law. Nonetheless, both mechanisms had the same rationale: to combat impunity. That was why her Government was working to achieve universal acceptance of the Rome Statute of the International Criminal Court.

54. Her Government distinguished between universal jurisdiction and the obligation to extradite or prosecute, reflected at the national level in the principle of subsidiary universality, which was exercised in the event of refusal to extradite an alleged offender from the Czech Republic. In the case of universal jurisdiction, no extradition request was needed. Under international law, States were not prohibited from extending the application of their laws

and the jurisdiction of their courts to persons, property and acts outside their territory. In the Czech Republic, universal jurisdiction was limited to only some of the offences criminalized under international law.

55. If there was no consensus on the proposal to refer the topic to the International Law Commission, her delegation was ready to participate constructively in the meetings of the Working Group. It was not prepared, however, to support any proposal for the establishment of an international mechanism that would have the power to interfere with national criminal proceedings initiated on the basis of universal jurisdiction. Such a mechanism would be incompatible with her Government's understanding of the independence and impartiality of the judiciary.

56. **Mr. Xiang** Xin (China) said that the debate of the past few years and the written comments submitted by Member States revealed the divergence of views on issues such as the definition, scope and application of universal jurisdiction. His delegation supported the Working Group's approach of limiting the scope of the current item to universal criminal jurisdiction exercised by domestic courts. Such jurisdiction was exercised in respect of certain types of crime regardless of where they were committed, the nationality of the suspect or the victim, and whether or not the crime had jeopardized the national security or major interests of a State. It was therefore distinct from the jurisdiction exercised by international criminal tribunals and the obligation to extradite or prosecute.

57. There was general support for the exercise of universal jurisdiction over cases of piracy on the high seas; in addition, some States believed that the principle was applicable to serious violations of the Geneva Conventions of 1949, while others held the view that it should cover only international crimes stipulated in relevant international treaties. His delegation believed that the scope of the principle should be based first and foremost on practical need: it was necessary to ascertain whether a crime was already covered by the territorial, personal or protective jurisdiction of a State before deciding whether it should be subject to universal jurisdiction. In addition, a decision on the scope of universal jurisdiction should be based on existing customary international law and the provisions of international treaties. The aim of discussions under the agenda item should be the codification of existing rules of universal jurisdiction rather than progressive development.

58. When establishing and exercising universal jurisdiction, States should act within the existing international legal framework, including the principles enshrined in the Charter of the United Nations, such as non-violation of sovereignty and non-interference in the internal affairs of States. They should also comply with international rules relating to the immunity of States, State officials, including Heads of State, and diplomatic and consular personnel. Since universal jurisdiction was supplementary in nature, it should be applied only where no State had established or exercised territorial, personal or protective jurisdiction over a crime.

59. Universal jurisdiction was a sensitive issue of international law; its improper application could have a negative impact on international relations. The issue should be considered in a balanced manner and decided by consensus. His delegation supported a continued exchange of views within the framework of the Working Group.

60. **Ms. Zarrouk Boumiza** (Tunisia) said that universal jurisdiction was an important mechanism for strengthening the rule of law, ensuring equitable justice and ending impunity. However, it must be exercised in strict conformity with the Charter of the United Nations and basic principles of international law, such as the sovereign equality of States, and only in exceptional circumstances and without selectivity or abuse. The international community must agree on a clear definition of universal jurisdiction and determine its scope through discussions in the Working Group.

61. Universal jurisdiction was distinct from, but complementary to, the jurisdiction of international criminal tribunals, which also played a key role in international efforts to end impunity. The International Criminal Court, in particular, had made a valuable contribution to those efforts. However, the Court dealt with serious crimes only after the fact; a mechanism for preventing them was also needed. For that reason, her Government had proposed the creation of an international institutional court as an advisory jurisdictional body responsible for ensuring respect for democratic principles and human rights, in line with the activities of the United Nations and regional organizations. Such a court would also fulfil an evaluation function: it would ensure that laws, regulations and practices in different countries were consistent with generally recognized principles of public governance, such as the principle that power

was based on the will of the people, the need for periodic free and transparent elections, and respect for fundamental human rights.

62. **Ms. Quidenus** (Austria) said that, while her Government supported the basic idea of universal jurisdiction in the interests of the common effort to combat impunity, the concept had given rise to considerable confusion, concern and, at times, tension in the international community. Her delegation commended the efforts of the Working Group but considered that the Committee was not the right forum for discussing such a complex legal issue; detailed analysis was needed in order to avoid certain misunderstandings that still prevailed in the discussions. Her delegation therefore supported the idea of requesting the International Law Commission to consider the topic.

63. **Mr. Nkerabigwi** (Rwanda) said that his Government believed in international justice but was totally opposed to international judicial imperialism, including the abuse of universal jurisdiction. Thousands of criminals who had committed genocide in Rwanda were enjoying safe haven in Western countries, including those regarded as promoters of democracy, the rule of law and good governance, and also in some African countries, despite the fact that his Government and the International Criminal Tribunal for Rwanda had issued warrants for their arrest. Those suspects would not be enjoying protection if universal jurisdiction was being correctly applied. Only a few States, particularly Scandinavian countries, had shown a real commitment to bringing them to justice.

64. Instead of trying Rwandan genocide suspects who were on their soil, some judges in France and Spain had arrogantly issued arrest warrants against senior officials of the current Rwandan Government, apparently for stopping the genocide. The warrants issued without any investigation by one French judge in 2006 had been rejected in 2012 by another French judge, after thorough investigations on the ground in Rwanda. The second judge's report had stated that outdated arrest warrants against Rwandan officials constituted strong proof that universal jurisdiction had been applied not in the interests of combating impunity but rather for malicious political reasons.

65. His delegation urged the General Assembly to agree on how universal jurisdiction could be used to advance justice; its abuse undermined key principles of international law, particularly the sovereign equality of all States and the immunity of State officials. His Government strongly supported the position of the African Union that arrest warrants issued on the basis of the abuse of universal jurisdiction should not be executed.

66. **Mr. Leonidchenko** (Russian Federation) said that his delegation recognized the potential of universal jurisdiction for combating impunity through the prosecution of individuals responsible for the most serious international crimes. However, the legal parameters of the concept remained somewhat vague and it would be premature to say that consensus was emerging on the issue. Until that happened, at least on the scope of universal jurisdiction and the conditions for its application, particular caution should be exercised. Arbitrary application or abuse of the principle could cause complications in relations between States; there were many current examples of such cases. Universal jurisdiction must therefore, as a minimum, be exercised in accordance with the rules of customary international law, in particular those relating to the immunity of State officials. It would be better to use other, less controversial, tools to combat impunity for the most serious international crimes. It should also be borne in mind that the work of the international criminal justice system, in particular the International Criminal Court, was unrelated to the topic of universal jurisdiction.

67. His delegation was not opposed to continued discussion of the topic by the Committee. However, the debate had not advanced significantly in the past year, and it was unlikely that further progress could be made on the basis of the material currently at the Committee's disposal. There was, therefore, no realistic prospect of developing international standards and criteria for the application of universal jurisdiction.

68. **Mr. Galicki** (Poland) said that the principle of universal jurisdiction was closely related to other topics being considered by other United Nations bodies besides the Committee; for example, it was related to the principle *aut dedere aut judicare*, which was under consideration by the International Law Commission. A careful analysis of State practice was necessary in order to confirm whether or not both principles existed in customary international law. Some States had noted, in their comments submitted to the Commission, that the principle of universal jurisdiction was crucial to the effective implementation of the obligation to extradite

or prosecute, and some had suggested that universal jurisdiction should be extended for that reason. However, while the Secretary-General's reports on the scope and application of the principle of universal jurisdiction showed that State practice was tending towards uniformity, it was not yet possible to conclude that the principle was a generally binding rule of customary international law.

69. In general, Poland applied the principle of territorial or personal jurisdiction, although it also applied the principle of universal jurisdiction in limited cases. Under its Penal Code, regardless of the law in force in the place of commission of an offence, Polish penal law applied to Polish citizens and foreigners facing extradition who had committed an offence abroad, where Poland was obliged to prosecute them under an international convention. In practice, the application of that provision was usually restricted to the most serious crimes, such as war crimes, crimes against humanity and genocide. Polish penal law also applied to foreigners who had committed an offence abroad against the interests of the Republic of Poland or of a Polish citizen, legal entity or organizational unit that did not have a legal personality, to foreigners who had committed a terrorist offence abroad, and to foreigners who had committed abroad an offence that was subject under Polish law to a penalty exceeding two years' imprisonment, where the perpetrator was present in Polish territory and no decision on his or her extradition had been taken. In addition, civil claims could be filed as an adjunct to criminal proceedings.

70. **Ms. Elyahou** (Observer for the International Committee of the Red Cross) said that universal jurisdiction over serious violations of international humanitarian law was rooted in both treaty law and customary law. The Geneva Conventions of 1949, while not expressly stating that jurisdiction was to be asserted regardless of the place of commission of the offence, had generally been interpreted as providing for universal jurisdiction over war crimes. Moreover, although the relevant provisions of the Geneva Conventions were restricted to grave breaches of those instruments, State practice had confirmed a customary rule whereby States had the right to exercise universal jurisdiction over war crimes, including serious violations during non-international armed conflict of common article 3 of the Geneva Conventions and Additional Protocol II and other crimes set forth in article 8 of the Rome Statute of the International Criminal Court.

71. A number of other instruments placed an obligation on States to exercise universal jurisdiction over crimes committed during armed conflict, including the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the International Convention for the Protection of All Persons from Enforced Disappearance. Where States were unable or unwilling to prosecute their own citizens or other individuals who committed such crimes in their territory or under their jurisdiction, the exercise of universal jurisdiction by other States could be effective in closing the impunity gap.

72. Universal jurisdiction could be exercised either through the enactment of domestic laws or through the investigation and trial of alleged offenders. More than 100 States had established universal jurisdiction over serious violations of international humanitarian law; in recent years, an increasing number of suspected perpetrators of war crimes committed during both international and domestic armed conflicts had been tried on that basis in domestic courts. In most cases, the States of nationality of the accused had not objected to the exercise of universal jurisdiction. States might want to attach conditions to the application of universal jurisdiction, such as the existence of a link to the forum State. The aim of such conditions should be to increase the predictability and effectiveness of universal jurisdiction and not to limit the possibilities for prosecuting suspected offenders. Moreover, while the application of universal jurisdiction might involve taking account of national policy considerations, the independence of the judiciary and fair-trial guarantees must be respected at all times.

73. In accordance with its mandate under the Geneva Conventions, the International Committee of the Red Cross had created numerous tools to aid States in their efforts to implement a system for suppressing serious violations of international humanitarian law. In order to be truly effective, all such systems must include the principle of universal jurisdiction. The International Committee of the Red Cross stood ready to contribute to any future efforts by the United Nations in that regard.

The meeting rose at 5.35 p.m.

United Nations A/C.6/68/SR.14

General Assembly
Sixty-eighth session

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Sixth Committee

Summary record of the 14th meeting
Held at Headquarters, New York, on Friday, 18 October 2013, at 10 a.m.

Chair: Mr. Kohona ..... (Sri Lanka)

Contents

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*)

Organization of work

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The meeting was called to order at 10.05 a.m.

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*) (A/68/113)

1. **Mr. Zemet** (Israel) said it was clear from the Secretary-General's report (A/68/113) that States held diverse views on the scope of universal jurisdiction, as reflected in the range of offences to which it was applicable under national legislation, including in some cases offences that lacked the characteristics inherent to the principle of universal jurisdiction under international law, as well as in the inconsistent definitions established by domestic legislators. For example, some States interwove the principle of universality with other principles of jurisdiction, while others did not. In the light of the diversity of views identified, it would be prudent to seek additional State reports on the topic.

2. Many States, including his own, acknowledged the importance of combating impunity and bringing the perpetrators of heinous crimes to justice. They also recognized the subsidiary nature of universal jurisdiction and the need to prevent its abuse by establishing appropriate safeguards in national legal systems, including requiring that criminal proceedings be brought by a public prosecutor and that a senior legal official authorize such proceedings in all cases based on universal jurisdiction; applying the principle only in cases where the accused was present in the forum State or where additional jurisdictional links existed; and according priority to States with primary or closer jurisdictional links to the case.

3. **Ms. Jorgji** (Albania) said that the Albanian Criminal Code established Albania's territorial jurisdiction over foreign nationals who committed an offence in the country; active personality jurisdiction for offences committed by Albanian citizens abroad; and protective jurisdiction for specific offences against the interests of the Albanian State or one of its nationals. It also stipulated, in its article 7 (a), that universal jurisdiction could be exercised by a competent national court in order to try a foreign national who was present in Albanian territory, had not been extradited, and had committed, outside Albanian territory, crimes against humanity, war crimes, genocide, crimes with terrorist purposes or torture, or one of the criminal offences which fell under the purview of Albania's criminal law pursuant to specific laws or international agreements to which Albania was a party.

4. The principle of universal jurisdiction was therefore an additional tool to help combat impunity and ensure that justice was done, by bridging the impunity gap that might exist between domestic and international criminal prosecution in cases where the State with primary responsibility to prosecute was unable or unwilling to do so. It had become clear from the Committee's discussion of the topic that the application of the principle of universal jurisdiction conflicted on some points with the principle of immunity of State officials from foreign criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) arising from treaties. Differences among States concerning the definition of universal jurisdiction had been expressed, and the importance of using the principle appropriately and not abusing it for political ends had been consistently stressed.

5. Without prejudice to the current discussions and the forthcoming work of the Working Group on the topic, the Committee should recognize its limits in dealing with such a highly complex legal issue. Her delegation therefore saw merit in the proposal that the topic should be taken up by a reliable expert body such as the International Law Commission.

6. **Mr. Gharibi** (Islamic Republic of Iran) said that a common understanding of the principle of universal jurisdiction had yet to be developed. The key question was whether and to what extent the Committee should engage in codification and development of the topic. The scope of universal jurisdiction and the conditions for its application should be determined in accordance with the relevant international treaties, taking into account fundamental principles of international law. In that regard, the opinion of some judges of the International Court of Justice, who had underscored in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (the *Arrest Warrant* case) that universal jurisdiction in absentia was unknown to international law, provided a valuable guide for identifying abuse of the principle. In their view, the exceptional cases where international treaties provided for universal jurisdiction applied only if the alleged offender was present in the territory of the forum State.

7. His delegation viewed universal jurisdiction as a treaty-based exception in the exercise of criminal

jurisdiction. The prevailing principle was that of territorial jurisdiction, which barred States from exercising criminal jurisdiction beyond their borders and was key to the principle of sovereign equality of States. Universal jurisdiction was not specifically addressed under Iranian legislation and it had never been invoked by his country's domestic courts. However, the Penal Code recognized the jurisdiction of national courts over crimes punishable under international treaties to which the Islamic Republic of Iran was a party, irrespective of the location of the crime or the nationality of the accused, provided that the accused was present in Iranian territory.

8. The Islamic Republic of Iran was a party to many international instruments, including several counter-terrorism treaties. While almost all of those instruments included the obligation to extradite or prosecute (*aut dedere aut judicare*), that concept should not be confused with the principle of universal jurisdiction. None of the bilateral agreements on extradition and mutual legal assistance concluded by his Government with other States contained any reference to universal jurisdiction.

9. The main concern with regard to the concept of universal jurisdiction was that its application could conflict with certain fundamental principles of international law, in particular the immunity of State officials from foreign criminal jurisdiction, which emanated from the sovereign equality of States. The doctrine was also said to have been used selectively. There was a continuing debate over the nature of the crimes to which such jurisdiction might apply, the conditions for and limits on its application, and the possible need for a link between the suspect and the prosecuting State and for the presence of the alleged offender in the forum State.

10. Criminal jurisdiction over foreign nationals should be exercised without bias and in good faith. It should not be applied in an arbitrary manner or violate the immunity granted under international law to Heads of State and Government, diplomatic personnel and other incumbent high-ranking officials. Leaving the interpretation of international crimes to national courts would have adverse effects on the stability and integrity of international law.

11. **Ms. Dieguez La O** (Cuba) said that the scope and application of the principle of universal jurisdiction should be discussed by all Member States within the framework of the General Assembly, with the primary aim of preventing its abuse. Her delegation reiterated its concern at the unwarranted, unilateral, selective and politically motivated exercise of that principle by the courts of developed countries against individuals or legal entities from developing countries, with no basis in any international norm or treaty. It also condemned the enactment by States of politically motivated laws directed against other States, which had harmful consequences for international relations.

12. The principle of universal jurisdiction should be exercised by national courts in strict compliance with the principles enshrined in the Charter of the United Nations, in particular the principles of sovereign equality, political independence and non-interference in the internal affairs of States. It should not be invoked to diminish respect for a country's national jurisdiction or to denigrate the integrity and values of its legal system. Its application must be limited by absolute respect for the sovereignty of States and always be supplementary to their actions and national jurisdiction; the principle should be exercised only under exceptional circumstances in which there was no other way to prevent impunity. Moreover, the absolute immunity granted under international law to Heads of State, diplomatic personnel and other incumbent high-ranking officials must not be called into question.

13. The main objective of the General Assembly's work on the topic should be to draft international norms or guidelines in order to prevent abuse of the principle and safeguard international peace and security, establishing clearly under what conditions or within which limits universal jurisdiction might be invoked, as well as the crimes to which it should be applied. In her delegation's view, universal jurisdiction should be restricted to crimes against humanity and should be applied only in cases where there was no other way to bring proceedings against the perpetrators. The prior consent of the State in which the crime had been committed, or of the State or States of which the accused was a national, should also be obtained.

14. **Mr. Banze** (Mozambique) said that the agenda item was of particular concern to African States because they had been a major target of attempts by individual judges to apply the principle of universal jurisdiction. His delegation remained alarmed at the unilateral moves to prosecute certain African leaders, in clear violation of the norms of international law. All Member States should reflect on the legal and political

consequences of such actions, since any attempt to unilaterally interpret and apply the principle was unacceptable and would endanger and disrupt the global legal system.

15. In order to gain legitimacy and universal acceptance, the application of universal jurisdiction should be regulated at the international level and should be consistent with the relevant international legal instruments and with the Charter of the United Nations, in particular its non-negotiable provisions relating to the sovereign equality of all States, non-interference in the internal affairs of States and the immunity of State officials, in particular Heads of State and Government. The international community must establish the criteria for the application of universal jurisdiction and identify the crimes subject to it and the circumstances in which it could be invoked.

16. While strongly condemning any application of the principle of universal jurisdiction that was politically motivated or did not respect the principles governing international law, his delegation recognized that it was an important tool for the prosecution of perpetrators of certain serious crimes under international treaties and that its proper application would strengthen the rule of law at the national and international levels; impunity should not be condoned or accepted. His delegation remained open to sharing information and practices with other Member States.

17. **Mr. Guibila** (Burkina Faso) said that, in view of the difficulty of bringing the perpetrators of certain serious international crimes to justice, it was appropriate that the international community was seeking to develop the principle of universal jurisdiction. While there were considerable divergences of opinion among States regarding its scope and application, every effort should be made to reach a consensus, in order to prevent the abuse and selective use of the principle for political ends, bearing in mind that its ultimate aim was to combat impunity. In that connection, the principle should be applied in respect of the most serious international crimes, in other words, those that fell within the *jus cogens* category and were subject to and punishable under treaty law or international customary law. Such crimes included genocide, war crimes, crimes against humanity, piracy, slavery and human trafficking, hostage-taking and counterfeiting. Once a consensus was reached on the crimes that were subject to universal jurisdiction, each State should adopt domestic legislation establishing procedures for the prosecution and punishment of the perpetrators.

18. In Burkina Faso, a law implementing the Rome Statute of the International Criminal Court had been adopted in 2010. As well as defining the crimes subject to that Statute, determining the relevant competent authorities and providing for punishment, it was also applicable to other crimes, such as those recognized in the 1949 Geneva Conventions and their Additional Protocols. The country's judges could therefore exercise universal jurisdiction in respect of the crimes recognized under those instruments, which were unanimously accepted by the international community.

19. The broad range of opinions on the scope and application of the principle of universal jurisdiction should not prevent the international community from working to combat impunity at the international level on the basis of traditional principles and mechanisms of criminal jurisdiction, such as the principles of territoriality and personality. In that regard, the *aut dedere aut judicare* principle should complement the principle of universal jurisdiction with a view to overcoming the difficulties associated with the prosecution and punishment of international crimes. Judicial cooperation should also be encouraged.

20. **Ms. Pham** Thi Thu Huong (Viet Nam) said that, although universal jurisdiction was recognized to be an important principle in combating impunity for the most serious international crimes, its misuse could infringe the sovereignty and political independence of States and violate the general principles enshrined in the Charter of the United Nations. Given that ongoing efforts were needed to define the principle of universal jurisdiction and its scope, her delegation called for the drafting and development of international standards or guidelines that would clearly set out the range of crimes subject to the principle and the conditions under which it could be invoked.

21. The principle must be distinguished from other related concepts such as the obligation to extradite or prosecute (*aut dedere aut judicare*). Due attention should also be paid to the link between universal jurisdiction and the question of the immunity of State officials. Universal jurisdiction should be limited to the most serious crimes of concern to the international community and should be identified and agreed upon by all States. In her delegation's view, universal

jurisdiction covered only the core crimes of genocide, crimes against humanity and war crimes.

22. Universal jurisdiction should be applied with much caution and within a well-established framework in order to avoid any abuse that might violate the principles of sovereign equality, political independence and non-interference in the internal affairs of other States. It should also be supplemental to other jurisdictions with a stronger link to the crimes, such as territorial jurisdiction or nationality jurisdiction, since primary responsibility for investigating and prosecuting crimes lay with the territorial State or the State of nationality. Moreover, a State should exercise the principle over a crime only when the alleged perpetrator was present in its territory, and it must do so in compliance with universally recognized standards of human rights and international humanitarian law.

23. **Mr. Edu Mbasogo** (Equatorial Guinea) said that universal jurisdiction was a principle of international law intended to prevent impunity and ensure that the perpetrators of serious crimes such as war crimes and crimes against humanity were brought to justice. However, the abuse of that principle by certain States, which were setting themselves up as the world's policemen, posed a threat to international law itself. The two international warrants issued by French judges in 2012 for the arrest of the Second Vice-President of Equatorial Guinea in the so-called "illicit enrichment" case constituted a clear example of the politically motivated abuse of universal jurisdiction against African interests. Although the International Criminal Police Organization (INTERPOL) had blocked dissemination of the warrants on the grounds that their circulation would constitute a breach of its strict principle of neutrality, the French courts had continued to violate international law by authorizing a raid on and seizure of the headquarters of the Permanent Delegation of Equatorial Guinea to the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris, as well as the confiscation and illegal sale of assets belonging to the State of Equatorial Guinea and to its Second Vice-President, notwithstanding the absolute immunity from criminal jurisdiction that they enjoyed under international law.

24. Though all international warrants should be executed in accordance with international law, those issued by African judges were not executed in any non-African State. For example, Equatorial Guinea had issued an international warrant for the arrest and extradition of Mark Thatcher, a British national who had instigated and perpetrated mercenary terrorist acts against the State of Equatorial Guinea. Although his involvement in those crimes was well known, and he had admitted to them during his trial in South Africa, he had not been arrested or extradited to Equatorial Guinea.

25. **Mr. Kamau** (Kenya) said that the scope and application of the principle of universal jurisdiction on the basis of domestic legal rules and emerging judicial practice was controversial and a source of concern to many States. Unless the principle was carefully defined and regulated within acceptable norms and in keeping with the other principles of international law, its unilateral, selective and arbitrary application by States and international institutions could threaten national stability, democracy, and international peace and security. The primary responsibility to exercise jurisdiction lay in all cases with the territorial State; extraterritorial jurisdiction should be invoked as a secondary means when States were unwilling or unable to exercise their national jurisdiction. The double standards and overt politicization evident in the use of universal jurisdiction should be a matter of concern to the entire international community.

26. Where the principle of universal jurisdiction was applicable, it should be exercised fairly, uniformly and consistently, without abuse or selectivity, in good faith and in a manner consistent with other principles of international law, maintaining the rule of law and guaranteeing impartial, prompt and fair trials. States should seek acceptable means of applying it without violating the essential principles of international law that governed relations among them. The lack of a common understanding of the scope and application of universal jurisdiction would undermine the rule of law at the international level. Given that international law should be the sole foundation for addressing global issues, the United Nations was the venue with the broadest legitimacy for addressing the divergent views on the type and range of crimes that could be subject to that principle.

27. The concept of universal jurisdiction was distinct from the work of the International Criminal Court, which was complementary to national criminal jurisdictions and ensured that effective prosecution measures were taken at the national level in respect of the most serious crimes of concern to the international community, with enhanced international cooperation

and, where necessary, capacity-building. The preamble of the Rome Statute, while recognizing the primacy of national criminal jurisdictions, recalled that it was the duty of every State to exercise its criminal jurisdiction over the perpetrators of serious crimes. However, that court's superficial, erroneous and politically motivated interpretation and implementation of the Rome Statute in relation to Kenya was highly prejudicial to the national, regional and international interests of that country, which was an active, cooperating State party with a rich history of local jurisprudence. The International Criminal Court could not render justice if it disregarded the views of African States, failed to respect their sovereign institutions and failed to hold non-African States accountable.

28. The international justice system must respect the interdependence of peace, security and justice. The international community should therefore refrain from adopting a narrow and agenda-driven interpretation of the role of universal jurisdiction that excluded other processes relevant to international and national peace. Instead, it should advocate an inclusive and carefully calibrated international justice system with clear benchmarks, transparency and achievable standards, and should be willing to examine and amend the system in order to respond to the complexity of current global democracies and social realities. There was a need to build on the gains of reconciliation rather than simply meting out punishment. In that regard, the application of universal jurisdiction should not be an end in itself but part of a process towards lasting peace.

29. **Mr. Maope** (Lesotho) said that the absence of a common definition of universal jurisdiction had led to uncertainty about when the principle should be invoked and what crimes it covered. It was frequently perceived to be applied selectively and abusively. A precise, universally agreed definition of the principle, including the conditions for its application and the nature of the crimes to which it applied, was therefore essential. In applying the principle, it was important to take account of other well-established rules of international law, including the sovereign equality of States, territorial jurisdiction and the immunity of State officials. Moreover, the principle must not be used as a political weapon to undermine the sovereignty of weaker States and the legitimate right of State officials to immunity. While the principle of universal jurisdiction, when used in good faith, was a powerful tool for preserving the international community's fundamental values, protecting and promoting the rule of law and human rights and combating impunity, due caution must be exercised each time it was invoked.

30. The principle of universal jurisdiction gave States the authority to prosecute perpetrators of the gravest crimes of international concern, regardless of where the crime was committed or the nationality of the perpetrator or of the victim. However, no State could exercise criminal jurisdiction over crimes committed in the territory of another State unless it had some link with either the offender or the victim, or unless the crime was universally recognized or established under a treaty and the territorial State was unwilling or unable to prosecute. The principle of universal jurisdiction must be clearly distinguished from the obligation to extradite or prosecute (*aut dedere aut judicare*). In that regard, his delegation welcomed the International Law Commission's consideration of the relationship between those two concepts.

31. At the current stage, his delegation favoured continued discussion of the topic, particularly within the Working Group, in order to identify issues on which there was a common understanding and those that required further study, taking due account of the emergence of new treaties, State practice, judicial decisions and juristic writings that might provide greater clarity and substance.

32. **Mr. Musayev** (Azerbaijan) said that the application of the principle of universal jurisdiction helped to strengthen the rule of law at the national and international levels and was an important tool in combating impunity. Important steps, including the development of international jurisprudence, had been taken at the national and international levels to prevent and punish wrongdoing. While a number of treaties provided for jurisdiction in respect of various offences, State practice in general appeared to permit the application of universal jurisdiction only in the case of war crimes, crimes against peace and crimes against humanity.

33. Governments bore primary responsibility for ensuring accountability for serious crimes; universal jurisdiction should be regarded as a supplementary tool when the relevant national authorities failed to take action and existing international judicial mechanisms could not be invoked. The application of the principle was particularly important in situations of armed conflict, including those involving prolonged foreign

military occupation, since past wrongs left unpunished and unrecognized hindered progress towards peace and reconciliation and could play a key role in the emergence of new conflicts and the commission of new crimes. Efforts to ensure accountability must be free of selectivity and political motivation.

34. His delegation urged the Committee to continue its examination of the topic and viewed the establishment of a Working Group as a positive development. At the same time, it also saw the need for a comprehensive legal study, with the possible involvement of the International Law Commission in that regard.

35. **Mr. Zappalà** (Italy) said it was positive that the principle of universal jurisdiction was unanimously recognized as a fundamental tool for bringing the perpetrators of heinous crimes to justice. Although some delegations had criticized the exercise of universal jurisdiction in certain cases, they seemed to favour its more widespread use in other cases where an impunity gap existed, for example, as an alternative to extradition. International cooperation, and in particular judicial cooperation, was key in that regard.

36. Although there were still some differences of opinion concerning the crimes that were subject to universal jurisdiction, it was broadly accepted that the concept came into play when fundamental values of the international community were breached. Treaties codifying international norms had recognized the principle of universal jurisdiction for a number of extremely serious international crimes. Custom and treaties were mutually reinforcing factors that came into play in the application of universal jurisdiction at the national level, although in many cases the existence of an international convention played a decisive role. In Italy, for example, article 7 (5) of the Criminal Code permitted the exercise of universal jurisdiction when that was provided for by international treaties.

37. The topic needed to be studied in greater depth, with the examination of concepts from several branches of international law, including international humanitarian law and human rights law, criminal law and criminal procedure. More specifically, consideration should be given, inter alia, to the relationship of universal jurisdiction with the principles and rules on the independence and impartiality of prosecutors and judges; its links with the national procedural systems of States, in relation to the concepts of mandatory or discretionary prosecution; the links between universal jurisdiction and mechanisms of international cooperation; and the role of victims as plaintiffs in some national systems.

38. While the Secretary-General's reports on the scope and application of the principle of universal jurisdiction were informative, it might be helpful for the International Law Commission to conduct a more complex analysis of the topic, as had been proposed by some other delegations. Additional work by the Committee, including through the Working Group, would also be important.

39. **Ms. Dilogwathana** (Thailand) said that the exercise of universal jurisdiction over serious crimes of international concern could be a valuable means of eliminating impunity, since application of the principle provided a legal platform for States to act beyond their treaty obligations. With the exception of piracy, there was still no consensus on the *ratione materiae* of the crimes that were subject to universal jurisdiction, which left room for States to define and apply the principle based on their domestic law. The ambiguity of the definition and scope of universal jurisdiction in international law allowed the perpetrators of certain serious crimes to enjoy safe haven. Persons committing serious crimes that did not fall within the scope of universal jurisdiction should therefore be prosecuted in the States in whose territory the crimes had been committed or those where the perpetrators were present. The application of the principle of universal jurisdiction should not be politically motivated and should be consistent with other principles and rules of international law.

40. To better understand the concept and scope of universal jurisdiction, a distinction should be drawn between the jurisdiction of international tribunals over treaty crimes such as genocide, torture and slavery and the jurisdiction of national courts over the crimes that customary international law recognized as being subject to universal jurisdiction, as well as between the obligation to extradite or prosecute as required by international treaties and the obligation to extradite or prosecute as required by application of the principle of universal jurisdiction. In that connection, her delegation wished to draw attention to the judgment of the International Court of Justice in the *Arrest Warrant* case, where in a joint separate opinion, Judges Higgins, Kooijmans and Buergenthal had called on the international legal community to reconsider the scope

and application of the immunity of State officials and exceptions to it when establishing jurisdiction over foreign State officials. Both the legal and political aspects of that issue should be thoroughly examined.

41. Thailand was committed to ending impunity. As well as assuming jurisdiction in respect of piracy, its national courts exercised extraterritorial jurisdiction over certain crimes under treaties to which it was a party and its Government also complied with the obligation to extradite or prosecute contained therein.

42. **Mr. Muhumuza** (Uganda) said that it was important for the international community to agree on the scope and application of the principle of universal jurisdiction; the establishment of the Working Group was a positive development to that end. Uganda was committed to combating impunity, having been the first country to refer a case to the International Criminal Court and having surrendered fugitives from international jurisdiction to the appropriate tribunals on many occasions. Thus, its concerns regarding the scope and application of universal jurisdiction should not be taken to suggest that it wished to shield the perpetrators of heinous crimes from accountability.

Organization of work

43. **The Chair** recalled that the Committee had established two working groups during its 2nd meeting but had deferred the election of their chairs. He understood that there was general support for Mr. Nikolas Stuerchler Gonzenbach (Switzerland) to chair the Working Group on responsibility of States for internationally wrongful acts and for Mr. Thembile Joyini (South Africa) to chair the Working Group on diplomatic protection, and he took it that the Committee wished to elect them.

44. *It was so decided.*

The meeting rose at 11.30 a.m.

United Nations A/C.6/68/SR.15

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Sixth Committee

Summary record of the 15th meeting
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Chair: Mr. Kohona ..... (Sri Lanka)

Contents

Agenda item 77: Responsibility of States for internationally wrongful acts

Agenda item 82: Diplomatic protection

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The meeting was called to order at 10.05 a.m.

Agenda item 77: Responsibility of States for internationally wrongful acts (A/68/72, A/68/69 and A/68/69/Add.1)

1. **Ms. Carayanides** (Australia), speaking also on behalf of Canada and New Zealand, noted that the Sixth Committee was being asked once again to consider whether to negotiate the articles on responsibility of States for internationally wrongful acts as a convention, to adopt them in the form of a resolution or declaration, or simply to have the General Assembly take note of them with no further action. The report of the Secretary-General on responsibility of States for internationally wrongful acts (A/68/72) noted that decisions, international courts, tribunals and other bodies were increasingly drawing on the articles and the commentaries thereto in formulating their decisions. The articles had thus proven their worth as a persuasive source of guidance for both Governments and courts.

2. Australia, Canada and New Zealand continued to believe that it would be unhelpful to try to negotiate the articles as a convention. They currently served a useful purpose by guiding international bodies and Governments through their analysis of sensitive issues and their efforts to resolve questions of international law. It was important to avoid a scenario whereby the influence of the articles would be diluted and the Commission's work would be undermined. It was even more important to preserve the authority of the articles in practice than to codify them in a convention that might not achieve universality. The three delegations would, however, support the adoption of a resolution endorsing the articles and attaching them as an annex, which would ensure that their integrity was maintained and that the Commission's work was recognized and endorsed by the General Assembly.

3. **Mr. Karstensen** (Denmark), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), noted that between February 2010 and January 2013 there had been 55 cases in which international courts, tribunals and other bodies had referred to the articles on State responsibility as established rules or as part of customary international law, thereby reflecting the strong and authoritative impact of the articles on international dispute settlement. The Nordic countries continued to endorse the contents of the articles, which had been widely accepted since their adoption. The strongest possible position for the articles was as an annex to a resolution, as recommended by the International Law Commission. Despite differences of opinion on specific details, the articles reflected a widely shared consensus, and attempting to elaborate a convention might jeopardize the delicate balance built into them. It was thus not advisable at the present time to embark on negotiations toward a convention on State responsibility.

4. **Ms. Dieguez La O** (Cuba), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that the articles on responsibility of States for internationally wrongful acts, which had been widely used as a reference by international tribunals and States, contributed to legal certainty in relations between States and to the development of international law. CELAC endorsed the International Law Commission's recommendation that Governments should work towards adopting a convention on the basis of the article. The negotiation of such a convention would be a valuable exercise in addressing existing gaps in international law and promoting legal clarity. CELAC was convinced that the establishment of a working group on the issue was the path to follow on the way to a possible convention. It acknowledged the link between the articles on diplomatic protection and those relating to State responsibility, and that State practice and developments on State responsibility would have a positive impact on the work on diplomatic protection.

5. **Mr. Adamov** (Belarus) said that the principles and norms contained in the articles had already taken their rightful place in the contemporary public international law system, as was shown by the practice of international and national courts and other bodies. Currently, however, they were being applied selectively and their legal force was not universally recognized. It was important to differentiate between the provisions of the articles that codified international customs, which were those overwhelmingly referred to by courts and diplomats, and those that constituted progressive development of international law. To be further entrenched in international law, the articles must be fully and systematically accepted by all States. In that connection, States should clearly express the need and the political will to strengthen the institution of State responsibility through a convention, which

would bring greater consistency and predictability to the topic. On the other hand, there was a risk that negotiations on a convention might lead to a radical transformation of the articles, thereby calling into question their legal significance as a balanced and authoritative document and undermining the prospects for a convention.

6. Consideration should be given to the proposal that the General Assembly should adopt a declaration on the basis of the articles, without ruling out further work on a convention. That had been the approach taken with regard to many other topics, including the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which had been elaborated on the basis of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. It would be helpful if the Commission could set up a mechanism to accompany further discussions on documents that it had already elaborated.

7. **Ms. Dieguez La O** (Cuba) said that the topic of responsibility of States for internationally wrongful acts was of great importance for the progressive development of international law. Cuba supported all initiatives and proposals leading to negotiations on the adoption of the articles in the form of a convention. Although the articles contained important norms of customary international law that enjoyed broad international recognition, efforts should still be made to elaborate a convention. The reports of the Secretary-General (A/68/69, A/68/69/Add.1 and A/68/72) showed that some countries were reluctant to move ahead with the codification of those norms, arguing that opening up the text to negotiation might jeopardize the current consensus on the binding nature and acceptance of the articles and damage the delicate balance in the text. They saw no benefit in adopting or ratifying a convention on the topic. Delaying the adoption of a convention, however, would enable some States to continue acting with impunity and evading their responsibility for internationally wrongful acts. It would also lead to court rulings that were ambiguous and often contradictory because decisions on such a crucial issue were left in the hands of judges who were free to interpret the articles as they chose.

8. Cuba was in favour of elaborating a convention on the basis of the articles which did not affect the delicate balance of the current text. An international convention would establish binding criteria for States, ensure adherence to those criteria by the legal institutions envisaged in the articles and thus enhance their effectiveness and help to curb the dangerous trend towards unilateral action by some States, in violation of the Charter of the United Nations and the principles of international law. It would also help protect States that were the victims of wrongful acts committed by other States, including acts of aggression and genocide. Her delegation urged the Committee to challenge States that were violating international law to sign an international convention on State responsibility and to lend greater support to judges in their pursuit of international justice.

9. **Mr. Hill** (United States of America) said that his delegation continued to believe that the articles were most valuable in their current form and that there was little to be gained in terms of additional authority or clarity through the negotiation of a convention. As evidenced by the Secretary General's report, which pointed to the application of the articles by international courts and tribunals, they already had tremendous influence and importance. For States and for other international actors, the articles had proven to be a useful guide both on what the law was and on how it might be progressively developed. His delegation shared the concern expressed by others that the process of negotiating a convention risked undermining the important work carried out by the Commission over several decades, particularly if the resulting convention deviated from important existing rules or did not enjoy widespread acceptance. The better course would be to allow the articles to guide and settle the continuing development of the customary international law of State responsibility.

10. **Ms. Rodríguez Pineda** (Guatemala) said that the time was right to decide on the future of the articles. Some of the articles had already become customary international law, with some of their provisions forming the basis for decisions adopted by international courts as well as State practice. The transposition of the articles into customary international law constituted considerable progress, because they were binding on all States and the commentaries thereto could be used to determine the meaning and scope of the articles. Guatemala supported the idea of elaborating a multilateral convention of universal scope, which would help to provide legal certainty on the topic. Codification of the

articles would prompt States to seek greater unity in promoting the fundamental values of the Charter of the United Nations and to strengthen multilateralism, protect human rights and consolidate the rule of law. It would add legitimacy to the just conduct of States. The norms contained in the articles on attribution, exceptions and reparation were extremely important for the harmonization of international law and its application by international tribunals. There was a need for clear and uniform guidelines to assist those tribunals and help them avoid legal inconsistencies or political interpretations when they heard cases involving the responsibility of States.

11. The obligations of Member States under the Charter would always prevail when they were in conflict with obligations entered into by virtue of other international agreements. Codification would help to curb the tendency to expand the definition of concepts such as self-defence, which increased the probability of armed conflicts and encouraged States to resort to aggression even when they were not threatened. A treaty would also entail a mechanism for the settlement of disputes, which would guarantee the protection of rights and obligations under the treaty and make binding decisions possible. The world had recently witnessed the inability of States to reconcile their national interests with the requirements of international law, particularly in the area of international humanitarian and human rights law. That, together with complex conflicts involving a wide range of non-State actors, the proliferation of weapons and the development of new technologies, testified to the added value that a treaty would have. Given the importance of the responsibility of States in international law, a binding instrument must be concluded to strengthen the obligations of States and establish guidelines for effective compliance.

12. **Mr. Kowalski** (Portugal) said that the articles had reached a crucial stage of maturation and the time had come for the General Assembly to take action on them. State practice and the decisions of international courts and tribunals, including the case law of the International Court of Justice, testified to the usefulness of the articles and the need to continue consideration of the topic. There was ample evidence in the literature that showed an increasing tendency to accept the applicability of the articles, which were ready to be submitted to a diplomatic conference with a view to concluding a convention. Given the stability which the articles enjoyed, there was no reason to fear that the Commission's work would be extensively redone.

13. **Ms. AlNaser** (Saudi Arabia) said that the articles on responsibility of States for internationally wrongful acts should be codified in an international convention, as the only way of achieving legal certainty and harmonization on the topic. Codification would, in turn, contribute to the development of international law and promote the peaceful resolution of conflicts. Such a convention must place greater emphasis on State sovereignty and on the interplay between national laws and international law. It should also define the concepts of "internationally wrongful act" and "responsibility of States" in a manner that was consistent with both international law and the domestic laws of States. Her delegation would be submitting further comments on the articles at a later date.

14. **Mr. Pande** (India) said that his delegation welcomed the acceptance of the articles in State practice, scholarly writings and the decisions of courts, tribunals and other bodies. The concepts covered were less complicated than those proposed at the initial stages of drafting. For instance, the concept of State crimes had been replaced by the concept of serious breaches of obligations under peremptory norms of general international law. The commentary to draft article 40 gave several illustrations of such peremptory norms. Some of the most difficult articles had been recast to take into consideration the needs of States in difficult circumstances.

15. His delegation reiterated its view that the articles only addressed secondary rules of State responsibility, which would come into play only if an internationally wrongful act, as defined by a primary rule, was committed. In that connection, it should be noted that international law was still striving to achieve the type of universality that it had achieved in other areas. The text of the articles reflected the balance that the Commission had taken more than forty years to achieve. Accordingly, India considered that no further action on the topic was necessary at the current stage.

16. **Ms. Tomlinson** (United Kingdom) said that the articles on responsibility of States for internationally wrongful acts sought to balance the different views of States and combine elements of strict codification with elements of progressive development. Aspects of the articles had already been, and continued to be, highly

influential in many areas of international law, as was evidenced by the many judgments of both international and national courts and tribunals that made reference to them and also by the frequent recourse that Governments had to them in formulating their legal views. However, the articles did not reflect a settled view of customary international law or even a settled consensus of views among States, and elements within them remained unclear and disputed.

17. The United Kingdom continued to believe that there were dangers in pressing ahead with a convention at a time when the articles were becoming further engrained and State practice was becoming more settled. Taking such a course could provoke differences of views and threaten the very coherence that the articles had sought to achieve. Her delegation believed, therefore, that the Committee would be better advised to acknowledge the importance of the articles once again, but to defer further discussion until it became clear that the time was ripe for further action.

18. **Mr. Gonzalez** (Chile) said that States should be held accountable for their internationally wrongful acts, because State responsibility was a general principle of international law, similar to good faith in relations among States, or the principle of *pacta sunt servanda*. The time that had elapsed since the articles had been brought to the attention of Governments without any progress being made with regard to possible future approval showed how difficult it had been to reach a consensus on the subject. States had invariably acknowledged the importance of the articles, thus reflecting the value which they attached to the Commission's work. The International Court of Justice and many other international courts, tribunals and arbitral panels all had all referred to the articles in their decisions. The failure to establish a binding legal instrument on the basis of the articles or even to take a decision on its future approval more than 12 years after their completion did not augur well for the recognition of the importance of the articles.

19. Although Chile believed that the articles should be codified in an international convention, it did not deny the value of other sources of international law, including custom. On the contrary, it believed that much of the content of the articles formed part of customary international law, with many of the articles having been invoked by international tribunals. However, a convention provided a greater degree of legal certainty and was also the appropriate instrument for embodying new contributions in international law. A number of delegations continued to believe that certain aspects of the articles required further observations, but there was no point in bringing up the topic in the Sixth Committee every three years if no progress had been made on deciding how to proceed.

20. The Committee, through an ad hoc or working group, should identify problems which the articles continued to pose in order to consider them at a later date at a conference or similar forum. By way of transition, it might consider having the articles adopted by the General Assembly in the form of a declaration as a step towards their final adoption in the form of a convention. Without such initiatives, the articles might remain in their current form indefinitely.

21. **Mr. Zemet** (Israel) said that the law on State responsibility was a fundamental pillar of public international law, serving to enhance both the rule of law and peace and stability among nations, and that the articles were an undeniable legal accomplishment, notwithstanding his Government's reservations on certain issues. His delegation continued to believe that it would be unadvisable to embark on negotiations for the formulation of a convention at the current time, because that might unravel the fragile balance struck in the wording of the articles. Like other States, Israel was in favour of the progressive development of that important body of law, but believed that the articles should be permitted to develop organically through their affirmation in the marketplace of jurisprudential ideas, not through multilateral treaty negotiations or international conferences. The articles had already begun to gain the respect of scholars and the imprimatur of judicial and arbitral courts and tribunals, as shown in the report of the Secretary-General (A/68/72), and had proved to be a useful guide for States and practitioners in their non-binding form. It was therefore difficult to see what would be gained from the adoption of a convention at the current juncture.

22. **Mr. Leonidchenko** (Russian Federation) said that the updated compilation of decisions by international courts and tribunals in the report of the Secretary-General (A/68/72) confirmed that the articles were being actively applied in practice as norms of international customary law and contributed significantly to the work of international judicial bodies. Despite some provisions that required additional work, in particular articles 25 and 41, on the

whole the articles were well articulated and balanced and were a good basis for further work. Since the goal of the International Law Commission was to promote the progressive development and codification of international law, and relevant General Assembly resolutions had repeatedly drawn the attention of States to the articles, his delegation supported the idea of holding an international conference to elaborate a legally binding convention on responsibility of States for internationally wrongful acts.

23. **Mr. Gharibi** (Islamic Republic of Iran) said that his country attached high importance to the question of State responsibility and was of the view that many provisions of the articles were an expression of customary international law, in particular articles 41, 48, 50 and 54. They not only reflected existing international law but were also consistent with a number of authoritative pronouncements in international case law, including decisions of the International Court of Justice, and prevailing doctrine. The rules on State responsibility were the cornerstone of the rule of law in international relations; they should be clear and known to all subjects of international law, and that was only possible if they were crystallized in a treaty. Accordingly, his delegation believed that the time was ripe to convene a diplomatic conference to adopt a convention on State responsibility. The articles were the best basis for such a legally binding instrument.

24. **Ms. Tajuddin** (Malaysia) recalled that at the sixty-fifth session of the General Assembly, her delegation had not been in favour of initiating negotiations aimed at developing a convention on state responsibility, because such a move might unravel the fragile balance in the wording of the articles. It had also indicated that the articles needed further in-depth consideration and that, as comprehensive as they might set out to be, they should only be considered guidelines.

25. Malaysia remained concerned about draft article 2, which seemed to suggest that fault or wrongful intent on the part of the State was not required in order to establish the existence of an internationally wrongful act. That obligation must be carefully considered by States. It was also concerned about article 7, which dealt with the *ultra vires* acts of State organs. Introducing such an obligation would require States to assume the conduct or wrongdoing of an organ or a person beyond the power given to such organ or person by those States. There would be considerable financial implications for a State found to be in breach of such an obligation. Given that such issues required further consultations among States, the articles should remain in the form of guidelines at the current juncture.

26. **Mr. Aprianto** (Indonesia) said that the articles on State responsibility would make an important contribution to strengthening the commitment of States to the rule of law and would be instrumental in governing relations between States, in particular with respect to the peaceful settlement of disputes. Discussions should continue on whether to convene a diplomatic conference to elaborate an international convention on the basis of the articles. Such a conference would give all States the opportunity to present their views in a more exhaustive manner and would enrich the progressive development of international law.

27. **Ms. Cabello de Daboin** (Bolivarian Republic of Venezuela) said that the topic of responsibility of States for internationally wrongful acts was of primary importance for preserving international order, developing relations among States based on respect and equality, and strengthening the rule of law internationally. The Committee should decide at the current session either to adopt a declaration as a first step towards codification, or to call for the convening of an international conference to adopt the articles in treaty form. Nonetheless, the adoption of such a declaration or the convening of such a conference did not mean that areas in which countries were not in agreement could not be further developed at a later stage.

Agenda item 82: Diplomatic protection (A/68/115 and A//68/115/Add.1)

28. **Mr. León González** (Cuba), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that diplomatic protection was an important area with a long-standing tradition in international relations between States. The articles on diplomatic protection generally reflected the most frequently recognized State practice on the topic and were consistent with international customary norms. It was therefore important to work towards the adoption of an international convention to permit the harmonization of State practice and jurisprudence on the topic. The negotiation of such a convention would

be a valuable exercise in addressing existing gaps and bringing legal clarity and predictability to the topic. The convention would also serve to enhance the rule of law and contribute to the codification of international law in the area of human rights, including the protection of refugees and stateless persons. It would also guarantee the right of States to protect their nationals by invoking the responsibility of other States for injuries caused by internationally wrongful acts committed against those nationals.

29. The establishment of a working group on the question within the Sixth Committee would be the right path to take for the possible elaboration of an international convention. The articles on diplomatic protection and those relating to State responsibility were linked. Further State practice and development on State responsibility would have a positive impact on the work on diplomatic protection. The Community of Latin American and Caribbean States stood ready to contribute to that debate.

30. **Ms. Aas** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the articles on diplomatic protection made an important contribution to international law. The reports of the Secretary-General (A/68/115 and A/68/115/Add.1) had confirmed the existence of diverging views on the articles, including the question of their final form. The Nordic countries stood ready to consider all options that would safeguard the core elements of the articles and ensure their position as a source of inspiration and guidance for States in exercising the right to diplomatic protection. However, bearing in mind the current situation, they were concerned that attempts to negotiate a convention at the current stage risked opening a debate that might undermine the already substantial contributions of the articles. It was therefore preferable, at the current juncture, to take note of the articles and to take them fully into consideration as guidance and inspiration for State practice.

31. **Ms. Al Shebel** (Saudi Arabia) said that persons and entities that were outside their country of nationality were entitled to protection by their State of nationality, acting through its diplomatic or consular agencies. Nationals of other States were also entitled to the same protection in the host State, based on the principle of reciprocity and in accordance with international law. Her Government was committed to ensuring that its nationals were treated in a humane manner when they were abroad, and that foreign nationals in Saudi Arabia were afforded the same treatment. Diplomatic protection was a means of protecting the rights of persons and entities and the interests of States at the international level. When exercising diplomatic protection, the rights and interests of the injured party must be safeguarded. However, the State should not intervene to protect its nationals if they had not made any attempt to seek redress through the laws of the State in which they claimed to have been injured. Saudi Arabia was fully aware of the importance of reaching agreement on an appropriate and satisfactory text for the rapid conclusion of an international convention on diplomatic protection. It would be submitting further observations regarding the articles on diplomatic protection at a later stage.

32. **Mr. Hill** (United States of America) said his delegation endorsed the view that, insofar as the articles reflected the large body of State practice on diplomatic protection, they were valuable to States in their current form. However, it was also concerned that a limited number of the articles were inconsistent with well-settled customary international law. As in the case of the articles on State responsibility, the negotiation of a convention on diplomatic protection might undermine the substantial contribution already made by the articles. Therefore, it would be preferable to allow time for the articles to influence and help settle State practice. The General Assembly should take no further action on the articles at the current time.

33. **Mr. Kowalski** (Portugal) said that the fact that the Commission had completed its work on diplomatic protection in less than ten years proved that the topic was indeed ripe for codification. Diplomatic protection served an important function as a means of last resort for the protection of human rights. There was a recognizable trend towards giving individuals and groups greater autonomy and the power to protect their own rights; his Government endorsed that trend. Despite its disagreement with certain aspects of the articles pertaining to both scope and content, Portugal found the articles on diplomatic protection amenable to transformation into an international convention. It hoped that the articles on diplomatic protection and those on State responsibility could soon become parallel conventions, representing a major step towards consolidating the law of international responsibility.

34. **Mr. Katota** (Zambia) said that the rules on the protection of ambassadors and other diplomats, which were among the oldest and most fundamental obligations of international law, made it possible for them to discharge their vital functions in the development of friendly relations between States. Violence committed against the security and safety of diplomatic and consular missions and representatives was a serious concern that needed to be addressed effectively through a legal instrument. Efforts must be redoubled to fulfil the obligation to protect diplomats and consular officials and to prevent attacks against them, as well as arbitrary arrest by security officers of host countries. Zambia looked forward to the negotiation of a convention on diplomatic protection and would be commenting on the articles at the meeting of the working group on the topic.

35. **Mr. Bailen** (Philippines) noted that the exercise of diplomatic protection had long been one of the most fertile if not controversial areas for the development of international law. Unfortunately, that discretionary sovereign prerogative had sometimes been misused as a pretext for intervening by force in other countries' domestic affairs. Although diplomatic protection existed under customary international law, consideration should be given to codifying and clarifying such customs through a convention.

36. Under customary international law, there were two main requirements for the exercise of diplomatic protection: the exhaustion of local remedies, and effective and continuous nationality. The local remedies rule was clearly codified in the articles. However, exceptions to that rule, set out in article 15, including exceptions (c) and (d), should, if necessary, be construed *in strictissimi juris*. Concerning the effective and continuous nationality requirement, the injured person or entity should, as a general rule, maintain the nationality of the espousing State from the moment of injury until at least the presentation of the claim. Specific rules were also outlined in Part Two of the articles, including with respect to direct injury to shareholders, stateless persons and refugees, and persons with dual or multiple nationality. The latter category was particularly important for the Philippines, which had passed a dual nationality law that affected many of its citizens living abroad. In that connection, his delegation would like more information on the practical application of the concepts of "predominant nationality" in article 7 and "direct injury" in article 12, in a manner that would make it possible for the State of nationality to exercise diplomatic protection.

37. As set out in article 18 (Protection of ships' crews), the right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection was not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members. That provision was of particular importance to his country, which accounted for one quarter of the estimated one million seafarers worldwide. Lastly, while there was no provision in the articles regarding the time period for exercising diplomatic protection, it might be useful to consider applying the principles of prescription, estoppel or laches to diplomatic protection, without which both human relations and international relations would always be unstable.

38. **Mr. León González** (Cuba) said that the adoption of a convention based on the articles would contribute to the codification and progressive development of international law, in particular the consolidation of norms concerning conditions that must be met for a request for diplomatic protection. It was unfortunate that some States, rather than making appropriate use of diplomatic protection as a supplementary means of protecting their nationals, employed it to exert pressure on States and promote transnational economic interests. The exercise of diplomatic protection was a sovereign right of States and of vital importance for the promotion of the rule of law at all levels. Its application to refugees and stateless persons contributed to the protection of the rights of those highly vulnerable groups. The articles on diplomatic protection were closely related to those on responsibility of States for internationally wrongful acts, and both texts should be handled in the same way. In order to promote the broadest possible consensus, the articles should be referred to a Sixth Committee working group, which would work out the final details of an international convention on diplomatic protection.

39. **Mr. Desta** (Eritrea) said that his country attached great importance to the subject of diplomatic protection and to developing effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives. Failure to respect the inviolability of diplomatic and consular missions and their representatives was a matter of great concern to his delegation. Eritrea took its

responsibilities under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and other relevant instruments seriously and ensured the protection of the representatives of diplomatic and consular missions as well as the inviolability of their premises and communications. It called for vigilance and cooperation in order to prevent criminal acts and to ensure the protection of diplomatic and consular missions and their personnel in all States.

40. **Ms. Tomlinson** (United Kingdom) said that in previous discussions her delegation had agreed with the Special Rapporteur that the fate of the articles was closely bound up with that of the articles on State responsibility. The former could be seen as giving content, in the specific context of diplomatic protection, to the admissibility requirements of article 44 of the latter. Thus, in the absence of consensus on the elaboration of a convention on State responsibility, any decision to begin negotiating a convention on diplomatic protection would be premature. Moreover, the articles on diplomatic protection went beyond the straightforward codification of current law and contained elements that would amount to progressive development of customary international law on the topic. Some of those elements would conflict with her country's current practice and were undesirable. In that connection, the apparently non-binding draft article 19, (Recommended practice) seemed inappropriate for inclusion in a treaty and risked undermining the discretion which States had to decide whether or not to exercise diplomatic protection. A convention on diplomatic protection should not be seen as the only possible conclusion to the work on the topic. In the absence of a convention on State responsibility, the best approach would be to allow the articles to inform and influence State practice. Consideration of the agenda item should be deferred until it was clear that the time was ripe for further action by the Committee.

41. **Mr. Gonzalez** (Chile) said that diplomatic protection was a topic of major importance for the codification and progressive development of norms of international law. The articles on diplomatic protection should therefore take the form of a convention, which would enhance legal certainty on the topic. Although Chile was in favour of the elaboration of a convention on diplomatic protection, it believed that priority should be given to the development of a convention on responsibility of States for internationally wrongful acts, which was also being considered by the Committee.

42. **Mr. Leonidchenko** (Russian Federation) said that the articles on diplomatic protection struck a good balance between codification of the existing practice of States and progressive development of international law. They helped to clarify and develop norms of customary international law with regard to the protection by States of their nationals and legal entities, as well as refugees and stateless persons from the wrongful acts of other States. They provided a satisfactory answer to a number of questions relating to diplomatic protection, including the definition and scope of the concept, the right of States to exercise it, the nationality of persons subject to diplomatic protection, and the protection of corporations. On the whole, they complemented the articles on responsibility of States for internationally wrongful acts and could serve as a basis for the elaboration of a convention. Nonetheless, his delegation was willing to consider other ways of making the articles legally binding, including in the context of a discussion on the fate of the articles on State responsibility.

43. **Mr. Gharibi** (Islamic Republic of Iran) said that any legal regime on diplomatic protection must observe a delicate balance between the rights of persons or entities and those of States. It was doubtful that the current articles could allay those concerns. They had been adopted in a considerably shorter period of time than other texts developed by the Commission, and that was perhaps why not all of them could be said to reflect customary international law. For instance, articles 7 (Multiple nationality and claim against a State of nationality) and 8 (Stateless persons and refugees) had been formulated on the basis of the case law of regional tribunals or of sui generis tribunals, which could hardly reflect general international law. Some areas of diplomatic protection were not covered and some provisions, for instance draft article 15, paragraphs (b) and (d), were vague or hypothetical.

44. The fact that States had differing views on the future of the articles indicated that they needed more time for further consideration of its content. More time would also provide an opportunity to assess the extent to which the articles reflected State practice. It would accordingly be premature to develop the articles as a legally binding instrument.

The meeting rose at 12.05 p.m.